Petitioner's claim to monthly social security benefits is predicated on Public Law 761, found in 42 USC 415 (note) (Supp II) (App 5a-6a), an amendment in 1954 to the Social Security Laws, which created a fully insured status retroactively in those decedents who died before September 1950, who had six quarters of coverage, but who did not die fully insured.

The basis for federal jurisdiction in the court of first instance was Sec. 205 (g) of the Social Security Act, as amended (Sec. 405 (g) Title 42, U. S. Code).

The Circuit Court of Appeals for the Sixth Circuit took the view that the provision in 42 USC 402 requiring a decedent to have died fully insured after 1939, precluded recovery by petitioner under 42 USC 415 (note) (Supp II) (App 5a-6a), the amendatory law of 1954, and in its decision indicated that the only pertinent provision of the 1954 law was sub-section (a), which redefined a "fully insured individual."

Petitioner filed a petition for rehearing in the court below. Whereupon, in denying the petition for rehearing, the lower court held that in any event, petitioner could not avail herself of the provisions of the 1954 amendment, as her decedent died with six quarters of coverage and consequently was fully insured when he died.

REASONS FOR GRANTING THE PETITION

(a). The Circuit Court of Appeals for the Sixth Circuit reached an incorrect conclusion that because petitioner's decedent had six quarters of coverage when he died in 1938, that he was fully insured, and being fully insured petitioner can take no advantage of the amendment of 1954 to 42 USC 415.

If six quarters of coverage (prior to the 1954 amendment) in itself created a fully insured status, Congress

would have had no reason to amend 42 USC 415 to create a fully insured status, in cases where a decedent died prior to September 1950 and *had six quarters of coverage, but died not fully insured.* It is solely by reason of the 1954 amendment that petitioner can now claim a retroactive fully insured status for her husband who prior to the 1954 amendment, had only been credited five quarters out of six quarters earned, toward such fully insured status, under 42 USC 415.

(b). The decision of the Circuit Court of Appeals was likewise incorrect in the conclusion reached that the pertinent part of the amendatory law merely redefined the status of a fully insured individual. The lower Court failed to include in its decision or in the foot-note of the printed decision of the case as it appears in 264 F 2d 311, sub-section (b) of the amendatory law, which made the new fully insured status applicable in the case of monthly benefits under the Social Security Law, after August 1954. (See 68 Stat. 1084, 83rd Congress, 2d Session, 1954, where sub-section (b) appears as part of the 1954 amendment.)

The purpose of 42 USC 415 *as amended* was to provide monthly benefits to aged widows whose husbands died *not fully insured* prior to September 1950, *but who had six quarters* of coverage, as was the case with petitioner's decedent. Nowhere in the amendatory law is there any language to the effect that such new benefits were restricted to cases where the husband died after 1939.

The emphasis placed by the lower Court on a statement in a Senate report that the purpose and effect of the amendatory law was to benefit aged widows whose husbands died after 1939 and prior to September 1, 1950, is a reference to a statement made in error in said report. The statement referred to in the Senate report No. 1987 of the 83rd Cong. 2d Session, is found under a heading "Summary of Principal Provisions of the Bill."

As the bill did not contain either originally or in its final form, any provision that benefits would be limited to those who died after 1939, the reference in the Senate report was without foundation and was merely an interpolation. As such it has no bearing on the legislative history of the bill and in no way militates against petitioner's contention. The erroneous statement in said report was explained to the lower court in argument and in petitioner's briefs.

A correct statement of that portion of the bill is found in House Report 1698 83rd Cong. 2nd Session under the heading: "Summary of principal provisions of the bill" and the sub-heading "Eligibility for benefits" as follows:

> "Benefits would be paid to the surviving aged widow, widowed mother, and children, or parents of any individual who died prior to September 1, 1950, and had at least 6 quarters of coverage."

Congress, under the 1954 amendment, in effect, created a new category of beneficiaries. It made the status of those decedents who died prior to September 1950 *not fully insured, but who had six quarters of coverage*, "applicable in the case of monthly benefits," and it left the category covered in 42 USC 402, namely those who died fully insured after 1939, without change. These are two separate and distinct classes of beneficiaries and both should be and must be given the benefit of the explicit and unambiguous language of the two separate Congressional enactments.

The effect of the lower court's decision is to limit the category of beneficiaries under 42 USC 415 as amended, by judicially inserting in the amendment a requirement that death had to occur after 1939.

To sanction such an insertion would be tantamount to judicial legislation.

RELIEF SOUGHT

Wherefore it is respectfully submitted that this petition for Writ of Certiorari to review the judgment of the Circuit Court of Appeals for the Sixth Circuit should be granted.

ROWLAND W. FIXEL
Attorney for Petitioner
2163 Penobscot Building
Detroit 26, Michigan

APPENDIX

OPINION OF UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Decided March 3, 1959.)

(Filed March 3, 1959.)

(CAPTION OMITTED)

Before MILLER, Circuit Judge, WEICK and GOURLEY, District Judges.

GOURLEY, District Judge. This is an appeal from the refusal of the district court to review a final decision of the Secretary of Health, Education and Welfare disallowing appellant's application for Widow's Insurance Benefits under provisions of the Social Security Act, as amended 42 U. S. C. 401 et seq.

This question is raised: Does Sec. 109 of 1954 Amendments to Social Security Act which redefines the term "fully insured individual" with respect to persons who died prior to September 1, 1950 repeal by implication the requirement of Sec. 202 (e) (1) that the "fully insured individual must have died after 1939"?[1]

[1] Section 109 of the 1954 Amendments to the Social Security Act, 42 U. S. C. 415, provides in pertinent part:

(a) In the case of any individual—

(1) who died prior to September 1, 1950, and was not a fully insured individual (under Title II of the Social Security Act), when he died, and

(2) who had not less than six quarters of coverage (as defined in such title), such individual shall, except for purposes of determining entitlement of a former wife divorced to benefits under section 202 (g) of the Social Security Act be deemed to have died a fully insured individual. Such individual's primary insurance amount shall be computed under subsection (a) (2) of section 215 of such Act. For the purpose of such computation, the provisions of Section 215 (d) (3) of such Act shall apply if such individual died a currently insured individual (under title II

Appellant claims survivors insurance benefits due as result of her husband's death May 17, 1938. Denial of said claim was based on the ground that appellant's decedent did not die after 1939, which was a condition precedent to entitlement to current benefits under Section 202 (e) of the Social Security Act.

Appellant bases her prayer for relief upon the proposition that the 1954 amendment not only provided a new criteria for determination of "fully insured" persons who died prior to September 1, 1950, but by implication deleted therefrom the requirement of death after 1939.

We are naturally most prone to liberally construe the Social Security Act in favor of the party seeking its bene-

---

of such Act) and any other person was entitled on the basis of his wages to monthly benefits or a lump-sum death payment under section 202 of such Act; in all other cases the provisions of section 215 (d) (4) shall be applicable, except that such individual's closing date shall be the first day of the quarter in which he died. In the case of any such individual, the requirement in subsection (h) of section 202 of such Act that proof of support be filed within two years of the date of his death shall not apply if such proof is filed before September, 1956.

Title II of the Social Security Act, as amended, 42 U. S. C. 401 et seq., provides in pertinent part:

Section 202 (e) (1) The widow (as defined in section 416 (c) of this title) of an individual who died a fully insured individual after 1939, if such widow—

(A) has not remarried,

(B) has attained retirement age,

(C) (i) has filed application for widow's insurance benefits or was entitled, after attainment of retirement age, to wife's insurance benefits, on the basis of the wages and self-employment income of such individual, for the month preceding the month in which he died, or

(ii) was entitled, on the basis of such wages and self-employment income, to mother's insurance benefits for the month preceding the month in which she attained retirement age,

(D) was living with such individual at the time of his death, and

(E) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than three-fourths of the primary insurance amount of her deceased husband, shall be entitled to a widow's insurance benefit for each month, beginning with the first month after August 1950 in which she becomes so entitled to such insurance benefits and ending with the month preceding the first month in which any of the following occurs: she remarries, dies, or becomes entitled to an old-age insurance benefit equal to or exceeding three-fourths of the primary insurance amount of her deceased husband.

fits, and if any basis in law exists to grant relief, we would so construe the Act. *Carroll* v. *Social Security Board*, 128 F. 2d 876 (C. A. 7).

But three compelling reasons militate against reversing the judgment of the lower court:

(1) Statutory construction negates appellant's position that the two Acts are irreconcilable. The 1954 Act was directed toward the lowering of the periods of coverage but evidences no intention to alter the requirement that the decedent must have died after 1939.

The law is well settled that repeals by implication are not favored. Where two acts cover the same subject matter both should be given effect if possible. *Posadas* v. *National City Bank*, 296 U. S. 497. Furthermore, if effect can reasonably be given to both statutes, the presumption is that the earlier is intended to remain in effect. *United States* v. *Burroughs*, 289 U. S. 159. To repeal a prior act there must be a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only pro tanto to the extent of the repugnancy. *United States* v. *Borden Co.*, 308 U. S. 188; *Walling* v. *Patton-Tulley Transportation Co.*, 134 F. 2d 945, 948 (C. A. 6).

In order for an amending statute to operate as a repeal of the earlier Act, the intention of the legislature to repeal must be clear and manifest; otherwise, the later Act is to be construed as a continuation of, and not a substitute for, the first Act and will continue to speak, so far as the two Acts are the same, from the time of the first enactment. *Posadas* v. *National City Bank*, *supra*.

We can find no irreconcilable conflict between the two provisions in question, but to the contrary we cannot but help conclude that said provisions are directed at different problems.

(2) The legislative history militates against appellant's contention, most glaringly brought into focus by the Senate Report.[2]

(3) Finally, promulgated regulations and interpretation by the Social Security Board are against appellant's contention.

The current regulation respecting widow's insurance benefits provides that a claimant is entitled to such benefits "if she: (a) Is the widow . . . of an individual *who died after 1939*, and who, at the time of such death, was fully insured . . ." 20 C. F. R., Sec. 404.319 (emphasis added). The regulation incorporating the 1954 change to Section 202 (e) (1) with respect to filing applications did not change the "after 1939" requirement, which has been in the regulations both before and since this time.

The court should be hesitant to set aside the Board's interpretation of an Act under which it functions unless the Act itself or the unambiguous legislative intent thereof is obviously misapplied. *McLaren* v. *Fleischer*, 256 U. S. 477, 481; *United States* v. *American Trucking Associations*, 310 U. S. 534, 549.

For the foregoing reasons, the judgment of the district court is affirmed.

---

[2] The Senate Report makes direct reference to the problem presented by this case. In discussing the purpose and effect of Section 109, the Report states (S. Rep. No. 1987, 83d Cong., 2d Sess. 4-5):

> 6. Eligibility for benefits.
>
> * * * * * * *
>
> (b) Benefits would be paid to the surviving aged widow, widowed mother, and children, or parents of any individual who died *after 1939 and prior to September 1, 1950*, and had at least 6 quarters of coverage. (Emphasis added.)

ORDER OF UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT REFUSING PETITION FOR REHEARING

(Filed April 9, 1959.)

Before MILLER, Circuit Judge, WEICK and GOURLEY, District Judges.

Since it is undisputed that Appellant's husband had earned six quarters of coverage pursuant to the Social Security Act when he died May 16, 1938, he was "fully insured" at time of his death, which by its express language rendered 42 U.S.C. 415 inapplicable to him.

The effect of the amending statute, as this court sees it, has been fully considered in this court's opinion of March 3, 1959, and no useful purpose could be served by consideration of appellant's petition for rehearing. Said petition is therefore refused.

WALLACE S. GOURLEY
District Judge
Sitting by Designation

DECISION OF REFEREE

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, SOCIAL SECURITY ADMINISTRATION
OFFICE OF APPEALS COUNCIL

Case No. C1-55
CLAIM FOR: Widow's Insurance Benefits

In the Case of
Catherine A. Lietz
(Claimant)
Henry C. Lietz
(Wage Earner)
364-05-2901
(Social Security Account No.)

Henry C. Lietz, the wage earner in this case, died May 16, 1938; having earned six quarters of coverage; and on July 13, 1956, Catherine A. Lietz, the wage earner's widow, herein known as the claimant, applied for a widow's insurance benefits under section 202 (e) of the Social Security Act as amended in 1954.

The Bureau of Old-Age and Survivors Insurance of the Social Security Administration, hereinafter mentioned as the Bureau, disallowed the claim because the wage earner died before 1940; and on September 18, 1956 the Bureau sent the claimant a letter to that effect. In all other respects she had qualified for the benefits sought. Disagreeing with that determination, the claimant requested a referee's decision without a hearing, saying: "Denial of my claim was based on provisions of Sec. 202 (d) (1) of the Social Security Act effective January 1, 1940, whereas it is my claim that Public Law 761, September 1, 1954, 68 Statutes, 83rd Congress, 2d Session repealed by implication the first mentioned Act."

Under the circumstances, the main question for consideration is whether the claimant's right to a widow's insurance benefits is barred by the fact that the wage earner died before 1940.

The essential facts in this case are simple, and apparently undisputed. The wage earner died on May 16, 1938, as alleged above, and prior to his death had earned six quarters of coverage, within the meaning of the Social Security Act as amended prior to 1954.

In view of the foregoing, the referee finds that the claimant is not the widow of a wage earner who died after 1939.

Applicable Law and Regulations

The only provision in the Social Security Act *as amended in 1954* for the payment of a widow's insurance benefits is section 202 (e) (1). This section provides that a widow shall be entitled to a widow's insurance benefits if she is "the widow (as defined in section 216 (c)) of an individual who *died a fully insured individual after 1939* . . ." (emphasis supplied), and meets several other conditions specified in the above statute. The 1954 statute clearly makes a widow's insurance benefits payable *only* to the widow of a wage earner who died "after 1939." Death after that date is a condition of entitlement, and it has not been met in this case.

In this connection the claimant's attorney is mistaken in believing that the Area Office disallowed this claim under section 202 (d) (1) of the Social Security Act of January 1, 1940. As indicated above, the disallowance was based on the Social Security Act as amended in 1954.

Apparently the claimant's attorney believes that the claimant is entitled to a widow's insurance benefits be-

cause of section 109 of the 1954 amendments, which reads as follows:

> "In the case of any individual (1) who died prior to September 1, 1950, and was not a fully insured individual (under Title II of the Social Security Act), when he died, and (2) who had not less than six quarters of coverage (as defined in such title), such individual shall, except for purpose of determining entitlement of a former wife divorced to benefits under section 202 (g) of the Social Security Act, be deemed to have died a fully insured individual."

This section is not a part of section 202 (e) which authorizes the payment of widow's insurance benefits, and which enumerates the conditions of entitlement to such benefits. This section (section 109) provides that under certain circumstances a wage earner shall be deemed to have died a fully insured individual, but it doesn't enumerate conditions of entitlement for any specific benefit. Therefore, it need not even be considered in making a determination in this case; but since the claimant's attorney has raised the question, it should be pointed out that section 109 would not, under any circumstances, be applicable to this case because it specifically applies *only* to an individual who "was not a fully insured individual (under Title II of the Social Security Act)" when he died. And this wage earner was a "fully insured individual" as that phrase is used in section 109 (a) (1) above. This fact is clearly explained in Social Security Administration Regulations No. 4, section 404.107 of which was issued for the purpose of interpreting section 109 of the 1954 amendments. Section 404.107 reads as follows:

> "An individual who died before September 1, 1950, was fully insured if he had not less than one quarter of coverage (no matter when acquired) for each two of the quarters elapsing after either 1936 or the

quarter in which he attained age twenty-one (whichever is later), and up to, but excluding, the quarter in which he either attained age 65 or died (whichever first occurred); provided that he had at least six quarters of coverage in any event

In view of the above, the referee holds that section 109 of the 1954 amendments is not applicable to this case, and that even if it were, it would not authorize the payment of a widow's insurance benefits, because the claimant is not the widow of a wage earner who died a fully insured individual *after* 1939.

It is the referee's decision that the claimant is not entitled to the benefit sought.

09:AC

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE

March 14, 1957

In the case of Catherine A. Lietz, Claimant
Henry C. Lietz, Wage Earner
364-05-2901, Social Security Account No.

Mrs. Catherine A. Lietz
652 Saint Jean Avenue
Detroit 14, Michigan

Dear Mrs. Lietz:

There is enclosed herewith a copy of the Appeals Council's denial of your Request for Review of the referee's decision on your claim for a period of disability. Your Request for Review having been denied, the referee's decision stands as the final administrative decision on your claim.

If you desire a review of the referee's decision by a court, you may commence a civil action in the district court of the United States in the judicial district in which you reside within sixty days from this date. For your information as to the action in the district court, your attention is directed to section 205(g) of the Social Security Act, as amended, (section 405(g), Title 42, United States Code.) If such an action is commenced, Marion B. Folsom, Secretary of Health, Education, and Welfare, is the proper defendant.

Sincerely yours,

JOSEPH E. McELVAIN
Chairman